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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO

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No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Michael Musante, respectfully requests that the petition of the People of the State of California for issuance of a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, and became final on April 24, 1980, be denied.

A. History of the Case

The following symbols are employed:

"CT" for clerk's transcript;

"RT" for normal reporter's transcript;

"RTF" for reporter Fletcher's transcript on motion to suppress.

A complaint filed in case F-1114 of the Municipal Court of San Bernardino County on January 10, 1978, charged respondent Michael Musante with burglary (Pen. Code #459) alleged to have been committed on January 2, 1978 (CT 82). An information in four counts filed in case number CR 34522 of the Superior Court

of San Bernardino County on January 27, 1978, charged respondent and Sindia Sue Musante in Count I with receiving stolen property on November 12, 1977 (Pen. Code #496), in Count II with possession of marijuana for sale (Health & Safety Code #11359, subd. (a)), in Count III with transportation of marijuana (Health & Safety Code #11360), and in Count IV with taking or driving a vehicle without consent of the owner (Veh. Code #10851) (CT 1-3).

On February 6, 1978, in the municipal court, respondent entered a plea of guilty to the burglary charge in F-1114, without specification of degree (CT 12-17). On March 31, 1978, his motions to suppress evidence pursuant to Penal Code Section #1358.5 (i) (providing for a de novo evidentiary hearing thereon in superior court), and to dismiss the information under Penal Code Section #995 were heard and denied in case CR 34522 (CT 23).

On April 7, 1978, pursuant to a plea bargain providing for dismissal of Counts I, III and IV, respondent entered a guilty plea to Count II of the information in case CR 34522 (CT 27-28).

On May 22, 1978, respondent's motion to withdraw his plea of guilty to the burglary charge in case F-1114 was heard and denied in municipal court (RT 1-27). On June 5, 1978, without hearing to determine the degree, he was sentenced in superior court to state prison for three years for burglary in the first degree (CT 47; RT 1-14). He was also sentenced to state prison for 24 months for possession of marijuana for sale in case CR 34522, 16 months of that sentence being stayed so that respondent would serve an 8 month term consecutive to that under F-1114 (CT 48-51; RT 17-24).

Respondent appealed from both judgments (CT 52-53).

In a published opinion issued on February 14, 1980, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, reversed the conviction on the possession of marijuana for sale charge (CR 34522) on the ground that the

warrantless search of a closed cardboard container in an automobile in which appellant was riding on November 12, 1977, and seizure of its contents, was unlawful (Pet., Appen. A).

Petitioner, the People of the State of California, sought a hearing before the California Supreme Court, which was denied on April 24, 1980 (Pet., Appen. B).

The Court of Appeal and this Court have refused to stay enforcement of the judgment (Pet., Appen. C).

Upon remand, the information in case CR 34522 was dismissed in the superior court without prejudice on June 25, 1980 (Appen. A).

B. Statement of Facts

1. The Burglary Charge

Respondent's conviction on the burglary charge rested upon his guilty plea to the charge that he unlawfully entered a dwelling house belonging to an Escol Moses in Lucerne Valley, California, with intent to commit theft (CT 82).

2. The Possession of Marijuana for Sale Charge

On November 12, 1977, at about 1:25 A.M., Deputy Richard Crocker, of the San Bernardino County Sheriff's Office, noted a car approaching a bridge over the freeway to enter a one-way access on-ramp to the freeway, weaving slightly and moving to the shoulder. Thereafter, in going up a small hill approaching the bridge, it slowed almost to a stop, went slowly through a green light at the top and up the ramp onto the freeway. After observing the car weave slightly in its lane, he followed it about a mile and a half. He then stopped the vehicle, spoke to the driver, checked her license, and, though he detected no odor of alcohol, did not know what was causing the vehicle to weave somewhat, and administered a field sobriety test, which she performed all right in his opinion (RTF 24-33). Though he had considerable experience, as a booking officer at county jail, in

observing persons under the influence of alcohol, and had attended Advanced Officer's Academy, he had only been on patrol about a month and did not believe he had sufficient knowledge or background to determine if she was under the influence. Without any established policy for doing so, he detained the vehicle and its occupants, telling them they were not free to leave until Highway Patrol officers arrived (RTF 30-33).

When Officers Stevens and Hernandez arrived about 15 minutes later, Hernandez immediately contacted the driver, quickly determined that she was not under the influence and left her (RTF 43-44). 5-10 minutes thereafter, Stevens contacted respondent, the passenger, and asked for the registration. As he was contacting the dispatcher by radio, requesting him to run a check on the VIN number, Hernandez told him the driver was not under the influence (RTF 51), but the driver was told not to leave until the VIN information came back. A few minutes later the dispatcher called back (RTF 42-43, 50-51). Though no evidence thereon was received at the hearing on the motion to suppress (RTF 1-56), Officer Stevens had testified at an earlier preliminary hearing that the vehicle had reportedly been stolen in Sonora (Prelim. Hearing Transcript 43).

After respondent and the driver had been arrested and removed from the stopped vehicle (RTF 42-51), Hernandez entered and searched the vehicle and, observing in the rear seat a closed cardboard electric blanket box which had been taped shut, removed the front portion of the box, opened the lid and found marijuana inside (RTF 44-47). Respondent testified at the hearing on his motion to suppress that before he had set the box in the rear seat of the car he had sealed it all the way around with a complete strand of 3 inch grey duct tape, making the lid tight, so as to secure it and conceal its contents (RTF 52-53).

REASONS FOR DENYING THE WRIT

The contention advanced by petitioner that application of the exclusionary rule is not justified in this case in that the search did not invade any constitutionally recognized right of privacy of respondent as to closed containers in the automobile by reason of alleged forgeiture by him of any such right upon becoming an occupant of a vehicle which a hearsay dispatcher's report lists as stolen, has already been determined adversely to petitioner by this Court as well as the California Supreme Court.

Petitioner, the People of the State of California, in predicating its contention that it is reasonable for police to conduct a warrantless search of closed containers in what it terms "a stolen vehicle" upon such preliminary, hearsay information, would impermissibly convict respondent before the evidence against him was gathered and without right to be heard.

If this case is of nationwide importance, it is only for the purpose of reiterating the fundamental constitutional principle that the right of the State of California, or of any public officer or individual, to attach the appellation of "thief" to respondent or any other citizen must be determined in a lawfully constituted judicial forum in which he has the right to be heard, and, in the absence of a showing of exigent circumstances rendering it impracticable, the search of closed containers of his property, wherever found, must be upon the authorization of a warrant issued upon probable cause by a neutral and detached magistrate, and not upon the judgment of an officer in the field engaged in ferreting out crime.

ARGUMENT

I

THE WARRANTLESS SEARCH OF THE BOX WAS NOT PROPER

In requesting issuance of a writ of certiorari in this

case petitioner's argument is flawed throughout by predicating justification of a warrantless search upon the judgment of an officer in the field, based upon the hearsay report of his dispatcher that the vehicle was reported stolen, that each of its occupants was its thief, a premise which was rejected by this Court in Mincey v. Arizona, (1978) 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408, in that it would "impermissibly convict the suspect even before the evidence against him was gathered." Obviously, petitioner cannot fortify its contention upon the proposition also rejected by this Court in Michigan v. Tyler, (1978) 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486, that any subsequent conviction can be used ex post facto to validate the introduction of evidence used to secure it, for any such hypothesis was removed by the District Attorney, San Bernardino County, in dismissing Count IV of the information alleging the unlawful taking of the vehicle (CT 27-28).

While we acknowledge that, as contended by petitioner, police may stop and search an automobile without a search warrant when they have probable cause to believe it contains contraband or evidence of a crime, that rule is inapposite to the factual situation in this case, where the initial stop was not based upon any such belief. Assuming that a sufficient showing was made that the necessary specific and articulable facts had come to the attention of Deputy Crocker which, together with rational inferences from such facts, were such as to justify the initial stop of the vehicle and detention of its occupants for questioning or other limited investigation short of probable cause for a warrantless search (Terry v. Ohio, (1968) 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868; Wong Sun v. United States, (1963) 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407), which we question, and also assuming that in further detaining them to get the opinion of someone else because of his own lack of knowledge of facts

warranting a belief the driver was under the influence, the detention had not, by reason of its intolerable intensity and scope, exceeded the justification for the initial intrusion (Terry v. Ohio, supra, 392 U.S. 1, 17-18, 20 L.Ed.2d 210, 88 S. Ct. 1868, 1878), which is also open to question, petitioner's argument as to justification for a warrantless search of the automobile misses the point. As the California Supreme Court pointed out in the case of People v. Dalton, (1979) 24 Cal.3d 850, 157 Cal.Rptr. 497, cert. den. _____ U.S. _____, the suspicion that an automobile may be stolen goes to the issue of the validity of a warrantless search of the automobile itself, under an exception to the warrant requirement based upon its mobility. Respondent is herein contesting the search of the closed, sealed box, not the search of the automobile. Petitioner has never contended that the box was stolen and the officers never testified that they had cause to believe it was stolen or that it belonged to anyone other than respondent.

Following Arkansas v. Sanders, (1979) 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586, and United States v. Chadwick (1977) 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476, the California Supreme Court, in People v. Dalton, supra, 24 Cal.3d 850, where the detention and search of the automobile after a traffic-related stop was based, as it was here, upon a VIN report that it was stolen, held that, in the absence of a showing of exigent circumstances rendering it impracticable to obtain a warrant, the warrantless search of a metal box found in the trunk after officers had arrested the occupants was not justified and that the defendant's motion to suppress the narcotics evidence found therein should have been granted. Petitioner, in attempting to distinguish the factual situation in this case from that in Arkansas v. Sanders, supra, 442 U.S. 753, refers to language of this Court in that case indicating that there will be difficulties

in determining which parcels taken from an automobile require a warrant for their search and which do not, depending upon whether, from their outward appearance, any reasonable expectation of privacy can be inferred (Arkansas v. Sanders, supra, at pp 764-765, fn 13). While luggage was characterized both in that case and in United States v. Chadwick, supra, 433 U.S. 1, as a common repository for one's personal effects when one wishes to transport them and inevitably associated with the expectation of privacy, we do not understand the language of either case to limit their holdings to suitcases and footlockers, but to apply to any container indicating by its outward appearance a reasonable expectation of privacy. As indicated in United States v. Chadwick, supra, at 433 U.S. 1, 10, 53 L.Ed.2d 538, 547, the United States Constitution, Fourth Amendment's guarantee of the right of the people to be secure in their papers and effects against unreasonable searches and seizures extends to their papers and effects closed against inspection, wherever they may be (Citing Ex Parte Jackson, (1878) 96 U.S. 727, 733, 24 L.Ed. 877, 879). In People v. Minjares, (1979) 24 Cal.3d 410, 153 Cal.Rptr. 224 (Cert. Den. _____ U.S. _____), the warrantless search of a tote bag which was zipped up when, after arrest of the driver, it was removed by officers from the trunk of an automobile stopped upon suspicion of involvement in an armed robbery, was held by the California Supreme Court to have been unlawful and to require reversal of the driver's conviction.

While that court, in People v. Dalton, supra, 24 Cal.3d 850 (Cert. Den. _____ U.S. _____), held that an occupant could assert a right of privacy as to closed items inside an automobile in which he was riding, it did not indulge petitioner's liberally employed hypothesis that the officer could act under the presumption that he was a thief in determining the necessity for obtaining a warrant, but, as noted in the foregoing, observed that such

reasoning would impermissibly convict the suspect before the evidence against him was gathered, and that, in accordance with Mincey v. Arizona, supra, 437 U.S. 385, 391, 98 S.Ct. 2408, 2418, one who has placed personal effects in an automobile which may be suspected of having been stolen does not thereby waive his right to privacy in their contents.

When Officer Hernandez entered the vehicle in this case after the respondent, a passenger, and his wife, the driver, had both been placed under arrest and removed from it to the patrol car (RTF 42-51), and saw the cardboard electric blanket box in the rear seat, nothing in its outward appearance indicated that it was anything other than a repository for personal effects of someone using it for the purpose of transporting them. It was closed, the lid in place and taped securely all the way around by a complete strand of grey 3 inch duct tape to keep it tightly closed and its contents concealed from view (RTF 52-53), thus indicating that when placed there by respondent it was with an expectation of privacy.

Although, in view of the absence of any predicate establishing petitioner's liberally employed reference to the respondent as "the man who had taken the car", we do not deem it necessary to respond to petitioner's reference to People v. Upton, (1968) 257 Cal.App.2d 677, 682-684, as authority for the proposition that under California law preexisting Dalton the search and seizure in this case would have been proper in that, under Upton a "thief" could not procure the benefits of the Fourth Amendment to shield him from a search of the box, we make bold to say that the Court of Appeal was not limited to the constraint only of the Dalton decision in invalidating the search of the box in the car. Long before Dalton this Court interpreted the right guaranteed by the United States Constitution, Fourth Amendment, of freedom from unreasonable searches and seizures, as meaning

that any intrusion in the way of search and seizure is an evil which cannot be justified without a careful prior determination of necessity involving a neutral magistrate's scrutiny, conclusions concerning probable cause and scope of a search to be drawn by him, rather than by an officer in the field "engaged in the often competitive enterprise of ferreting out crime" (Coolidge v. New Hampshire, (1971) 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022; Johnson v. United States, (1948) 333 U.S. 10, 92 L.Ed.2d 435, 668 S.Ct. 367). Although exceptions to the warrant requirement have been established where the public interest, in exigent circumstances in the field, requires some flexibility in the application of that general rule, such as where (a) danger to the law officer, or (b) risk of loss or destruction of the evidence, outweighs the reasons for prior recourse to a neutral magistrate, the burden is upon those seeking the exemption to show the need for it (Chimel v. California, (1969) 395 U.S. 752, 762, 23 L.Ed. 2d 685, 89 S.Ct. 2034; Katz v. United States, (1967) 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507). Petitioner has not met its burden of showing that the search of the box came within any such exception. Nothing in the appearance of the box suggested, nor did the officers in any way infer, that any danger to them or risk of loss or destruction of the box or its contents would result from holding it with the automobile until a warrant to search it could be obtained.

Unless possessed of that charismatic "intuition" which inspired lynch mobs toward accomplishing their quest for "justice" in such dramatic, but tragic, tales as "The Oxbow Incident" or the proceedings of vigilantes in the old west, a police officer at the immediate scene has no way of knowing under what circumstances each occupant came to be in an automobile or what he did or did not bring with him. An assumption drawn in the field as to the guilt of each occupant serves no purpose in evaluating

the legal status of any citizen, or of his property (United States Constitution, Sixth Amendment; United States v. Di Re, (1948) 332 U.S. 58, 92 L.Ed. 210, 68 S.Ct. 222). As indicated in Mincey v. Arizona, supra, 437 U.S. 385, 391, the occupant may have a lessened right of privacy in his person after having been taken into custody, but such lessened right does not extend to his property which is not on his person. The exigency which justifies the stop of the automobile must be assessed at the point immediately before the search. Once the police had seized the box, the extent of its mobility was in no way affected by the place from which it was taken. Such closed cardboard box, taped to secure its contents from view, when taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with the same type of property taken from other locations, its purpose being to serve as a repository for personal effects its owner wished to transport (Arkansas v. Sanders, supra, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2568). If seized elsewhere after the arrest of the respondent, its search would have been subject to the same general rule under the warrant clause, requiring the issuance of a warrant (Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034).

With due consideration for the public policy interests involved in protection of the proprietary rights of the putative owner of the automobile, as advanced by petitioner, the United States Constitution, Fourth Amendment, protects people, not places, from unreasonable governmental intrusions into their legitimate expectation of privacy (United States v. Chadwick, supra, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476). Were we diverted from that concept to extend petitioner's rationale to its logical perameters, anyone who, in the judgment of a police officer on the scene, was found in a place where he was not

legally entitled to be (a trespasser upon private property, a tenant holding over after expiration of the term of his lease, a jaywalker crossing outside a crosswalk, a parade participant marching without permit, a sit-down striker, a motorist parked overtime, to suggest but a few examples) would be considered to have waived any right to object to seizure and search of any and all containers of his or her personal effects. While we do not presume to say that petitioner would contend for so extreme an application of its concept of waiver, it is logically implicit in its theory that the Fourth Amendment guarantee extends to places rather than persons. As for petitioner's contention that application of the exclusionary rule operates to provide a shield for the criminal, contrary to the public interest, that argument is best answered in the language of this Court in the case of McDonald v. United States, (1948) 335 U.S. 451, 455-456, 93 L.Ed. 153, 158, as follows:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigencies of the situation make that course imperative."

Citing Rakas v. Illinois, (1978) 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421, in which this Court held that passengers in a vehicle could not, under the circumstances in that case, assert any Fourth Amendment claims against search and seizure of a rifle and of a box of shells in the glove compartment, by

reason of their lack of any expectation of privacy, petitioner argues that Musante, who, says petitioner, "is a car thief", is hardly in the position of being able to expect a legitimate expectation of privacy as to items in the victim's vehicle. Without further comment upon petitioner's injudicious propensity for name-calling, we would invite attention to the considerably different factual circumstances in that case (Rakas v. Illinois, 439 U.S. 128), from those in this case, in that the occupants of the car in Rakas v. Illinois not only did not assert or claim any interest in the rifle and shells, but disavowed any. That is not the situation in this case, where Musante asserted ownership of the box and had taken precautions to protect his expectancy of privacy with regard to it.

Contrary to petitioner's argument, Musante can and does assert that Rakas v. Illinois, supra, 439 U.S. 128, though authoritative as to a rule of federal standing in a factual situation different from that in this case, is not applicable here for that reason. While we recognize that the Dalton decision interpets rights granted under the Federal Constitution and is subject to the limits of Fourth Amendment rights as set forth in decisions of this Court cited herein, its decision in Rakas v. Illinois, being factually distinguishable, is inapposite to this case. We further recognize, however, as pointed out by the California Supreme Court in People v. Brisendine, (1975) 13 Cal.3d 528, 119 Cal.Rptr. 315, that the California constitutional prohibition against unreasonable searches and seizures (California Constitution, Article 1, Section #13) is a document of independent force under which power is retained to impose higher standards on searches and seizures than are required under the Federal Constitution (Cooper v. California, (1967) 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788), and in its decision in the case of People v. Dalton, supra, 24 Cal.3d 850, was not necessarily limited by

federal decisions permitting lesser standards in any event. Since the basic principle of law upon which that case (People v. Dalton, supra, 24 Cal.3d 850) and the decisions of this Court in Arkansas v. Sanders, supra, 442 U.S. 753, and United States v. Chadwick, supra, 433 U.S. 1, are all based is that enunciated in the 1971 case of Coolidge v. New Hampshire, supra, 403 U.S. 433, and the 1948 case of Johnson v. United States, supra, 333 U.S. 10, requiring that a determination of probable cause for a search be made by a neutral and detached magistrate, rather than by an officer under stress in the field, we respectfully submit that consideration of any question of retroactivity of application is not involved here.

In summary, we submit that it is apparent from the record in this case, viewed from whatever aspect, that after the respondent and his wife had been placed under arrest and removed from the vehicle, any possibility of their exercise of control over the automobile or its contents ceased to exist, as did any possibility of danger to the officers or risk of loss of any evidence contained within it; that any proprietary interest of anyone else in the automobile or its contents would have been fully protected when it came under exclusive control of the Highway Patrol; and that no exigent circumstances rendered it impracticable to simply impound the vehicle and contents for the short time necessary to obtain a warrant for search of the box. As, from its nature and appearance, a reasonable expectation of privacy was manifested, the warrantless search of the box required the exclusion of any evidence of its contents (Mapp v. Ohio, (1961) 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684). Whether entered under the constraint imposed by the decision of the California Supreme Court in People v. Dalton, supra, 24 Cal.3d 850 (Cert. Den. _____ U.S. _____), or the constraint imposed by this Court under its decisions in the cases of Arkansas v. Sanders,

supra, 442 U.S. 753; United States v. Chadwick, 433 U.S. 1; Coolidge v. New Hampshire, supra, 403 U.S. 443; and Johnson v. United States, supra, 338 U.S. 10, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, would be correct in rendering the same decision in the determination of the respondent's appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. WELLER, Attorney for Respondent, under appointment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two

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MOTION AND AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF ATTORNEY FOR INDIGENT RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND APPOINTMENT OF ATTORNEY FOR INDIGENT RESPONDENT

Respondent, Michael Musante, respectfully moves the Court for leave to proceed herein in forma pauperis in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court, and to file his response to the petition for writ of certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, filed by petitioner, the State of California, without printing the same. The typed brief of respondent in opposition is presented herewith for filing.

Respondent further respectfully moves the Court to appoint Richard J. Weller, whose offices are at 560 North Arrowhead Avenue, San Bernardino, California 92401, telephone (714) 885-0086, a member of the bar of this Court admitted to practice herein on December 6, 1954, as his attorney in this action, under Title 28, United States Code, Section 1915(d) and Rule 53(7) of this Court. Although said attorney represented respondent in the state court under appointment by that court, respondent does not have counsel

representing him in this Court, nor is he able, by reason of the facts set forth in the affidavit filed herewith in support of the within motion, to employ counsel, and the appointment of the state court does not extend beyond its jurisdiction. Richard J. Weller is willing to represent respondent herein if so appointed and herewith consents thereto.

Dated: September 22, 1980.

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Counsel for respondent under appointment of Court of Appeal, State of California, Fourth Appellate District, Division Two

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

Michael Musante, being first duly sworn, on oath deposes and says:

1. He is the respondent in the above entitled action and makes this affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. Respondent is unemployed and is unable because of his poverty to pay fees and costs of this case or give security therefor.

3. This is a proceedings in which the petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, in which are raised substantial questions of constitutional law, as more fully set forth in said petition and in the response of respondent submitted herewith for filing. Affiant is untrained

in the law, but is advised and believes that he has good and sufficient grounds, as set forth therein, for the denial by this Court of said petition. Respondent further respectfully requests that Richard J. Weller, whose offices are at 560 North Arrowhead Avenue, Suite 10, San Bernardino, California, telephone (714) 885-0086, a member of the bar of this Court, be appointed to represent affiant in opposing said petition. Although he represented affiant under appointment by the state court, in the matter of affiant's appeal, affiant does not have counsel representing him in this Court, nor is he able to employ counsel, and the appointment of the state court does not extend beyond its jurisdiction.

Michael L Musante
Michael Musante, Respondent

Subscribed and sworn to before me
this 22nd day of September, 1980,

Richard J Weller
Notary Public in and for said County and State.

OFFICIAL SEAL
RICHARD J. WELLER
NOTARY PUBLIC - CALIFORNIA
SAN BERNARDINO COUNTY
My comm. expires JUN 2, 1981

APPENDIX A

MINUTE ORDER

ACIS CASE NO: F-0002491
CASE NO: SCR-34522
FSS-22947
DEPT: 1

JUDGE: WILLIAM PITT HYDE
CLERK: JANICE NEWELL
BAILIFF: ANTHONY JAIME
REPORTER: S. KIRKPATRICK

DATE: 08/25/80 TIME: 08:30 AM
COUNSEL: P CASLAVKA DP
M. McDANIEL SSA
R. FRIEDMAN
J HOWARD DP

CASE TITLE: PEOPLE VS MUSANTE MICHAEL LEO DP
DEF 002

COPY NLO.

(PARTIES AND COUNSEL CHECKED IF PRESENT)

Thomas Gilcrest
ASST PROBATION OFFICER

NATURE OF PROCEEDINGS ( ) FILING OF: ( )(A) INFORMATION ( )(B) AMENDED INFORMATION ( )(C) AMENDMENT TO INFORMATION ( )(D) INDICTMENT ( )(E) AMENDED INDICTMENT ( )(F) AMENDMENT TO INDICTMENT.

4 ( ) CHARGE(S): _____

Trial Setting

1 ( )(A) Information ordered filed ( )(G) _____ ordered filed.

145 ( ) Motion by _____ to be relieved as counsel ( )(A) Granted ( )(B) Denied ( )(C) Submitted.
( ) After inquiry and advisal.

5 ( ) Public Defender appointed (_____ appearing).

6 ( ) Attorney _____ ( )(A) Retained ( )(B) Appointed ( )(C) Present ( )(D) Clerk to notify.

7 ( )(A) Defendant arraigned ( )(B) Formal Arraignment waived.

8 ( )(A) Information read ( )(B) Reading of Information waived ( )(C) Indictment read ( )(D) Reading of Indictment waived.

( ) The Defendant is informed of the elements of the charge(s). ( ) Factual basis established.
( ) The Court finds Boykin and Tahl Rules complied with.

11 ( )(A) Defendant pleads not guilty to _____.
( )(B) Defendant pleads not guilty by reason of insanity.
( )(C) Defendant pleads not guilty and not guilty by reason of insanity.
( )(D) Defendant pleads once in jeopardy to _____.

39 ( ) Defendant admits ( )(A) Prior(s) ( )(B) Armed allegation(s) ( )(C) Overt Act(s) ( )(D) Special allegation(s).

40 ( ) Defendant denies ( )(A) Prior(s) ( )(B) Armed allegation(s) ( )(C) Overt Act(s) ( )(D) Special Allegation(s).

38 ( ) Defendant stands mute to Prior(s)/Allegation(s)/Overt Act(s) (Court enters denial in his behalf).

18 ( ) Motions: ( )(A) 1538.5 P.C. ( )(B) 995 P.C. ( )(C) Reserved ( )(D) Set on _____ at _____ in Court _____ in Department _____. Points and Authorities due: Defendant _____ District Attorney _____.

13 ( ) Jury trial set for _____

212 ( ) Assignment Calendar set _____ at _____ in Court _____ in Department _____.

15 ( ) Defendant waives statutory time for ( )(A) Trial ( )(B) Sentencing.

222 ( ) Pre-trial Conference set _____ at _____ in Court _____ in Department _____.

27 ( ) Previous order forfeiting bail vacated ( )(A) Bail reinstated.

28 ( ) Defendant's motion for release on O.R. ( )(A) Granted ( )(B) Denied ( )(C) Submitted. 33 ( ) Defendant's motion for reduction of bail ( )(A) Granted ( )(B) Denied ( )(C) Submitted.

( ) Referred to Own Recognizance Officer/Probation Officer for report.

29 ( ) Bail set at $_____ ( )(A) Bail remains set at $_____.

30 ( )(E) Bail/Bond exonerated. 30 ( ) Defendant: ( )(A) Remanded ( )(B) Released ( )(C) On bail ( )(D) On Own Recognizance ( )(F) On Own Recognizance upon filing a signed agreement to appear.

2308 ( ) Defendant ordered to be present. ( ) Defendant granted _____ phone calls

144 ( ) Existing dates confirmed. at Defendant's expense.

VACAT ( ) Vacate _____

RESET ( ) _____.

127 ( ) Defendant remanded to Lower Court and ordered to appear on _____ at _____ in Court _____ in Department/Division _____ for further proceedings.

1540

9 ( ) Action continued to _____ at _____ in Court _____ in Department _____ for _____.

DATE: 1500 LH

32 (X) Matter Dismissed Without Prejudice.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

MICHAEL MUSANTE,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, Richard J. Weller, declare that I am an attorney at law licensed to practice in the State of California and a member of the bar of this Court admitted to practice herein on December 6, 1954, and having my office at 560 North Arrowhead Avenue, Suite 10, San Bernardino, California 92401.

1. On April 19, 1979, I was appointed by the Court of Appeal of the State of California, Fourth Appellate District, Division Two, to represent the respondent herein, Michael Musante, by reason of his status as an indigent defendant, in the matter of his appeal from the judgment of the Superior Court of the County of San Bernardino in cases number CR-432(Vic.) and CR-34522 of that court.

2. Since June 5, 1978, the respondent, a citizen of the United States, has been undergoing service of a sentence to inprisonment in the California State Prison for a term of three

years in case number CR-432(Vic.), not involved in the petition for writ of certiorari; that I am informed and believe upon the basis of the latest information available to me that at all times since June 5, 1978, respondent has been, and is now, an indigent person who, by reason of his poverty, is unable to pay fees and costs of this case or give security therefor;

3. This is a proceedings in which the petitioner, the People of the State of California, requests that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, in which are raised substantial questions of constitutional law, as more fully set forth in said petition and in the response of respondent submitted herewith for filing. The respondent is untrained in the law, but in my opinion has good and sufficient grounds, as set forth therein, for the denial by this Court of said petition. Although I represented the respondent under appointment of the state court, in the matter of his appeal, that appointment does not extend beyond the jurisdiction of the state court, nor is the respondent able to retain counsel. I would be willing to accept, and hereby consent to appointment to represent respondent in this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 1980, at San Bernardino, California.

RICHARD J. WELLER, Declarant
560 N. Arrowhead Avenue, Suite 10
San Bernardino, CA 92401
Telephone: (714) 885-0086
SSN 517-07-7700